Supreme Court, U.S.
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No. 96-31

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

EVELYN SMITH,

Petitioner,

v.

FAIR EMPLOYMENT AND HOUSING COMMISSION, KENNETH PHILLIPS, AND GAIL RANDALL,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

California imposed substantial penalties and a cease-and-desist order on Evelyn Smith, a widow and landlord who earns her living by renting four one-bedroom units that she owns, when she refused to rent to an unmarried couple because of her religious convictions against facilitating fornication.

1. Whether the court below erred in holding that prohibiting and penalizing religiously motivated conduct imposes no substantial burden on the exercise of religion, under the Religious Freedom Restoration Act or the Free Exercise Clause, if people may avoid the penalties by selling their property and permanently abandoning their occupations?

2. Whether a ban on housing discrimination against unmarried couples, as applied to an owner of four rental units who has sincere religious objections to facilitating fornication, serves a compelling interest by the least restrictive means where:

a. The state does not pursue its alleged interest uniformly, because the fair housing statute permits all state-operated and private colleges and universities to exclude unmarried couples from campus housing, and because state law discriminates between married and unmarried couples in myriad other ways; and

b. The state offered no evidence that unmarried couples have serious difficulty finding housing?

PARTIES

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OPINIONS BELOW

The California Supreme Court's opinion is reported at 12 Cal.4th 1143, 51 Cal.Rptr.2d 700, 913 P.2d 909 and appears in the Appendix at 1a. The California Court of Appeal's opinion is reported at 30 Cal.Rptr.2d 395 and appears in the Appendix at 155a. The California Fair Employment and Housing Commission's administrative decision is not reported, and appears in the Appendix at 194a.

JURISDICTION

The California Supreme Court issued its decision in this case on April 9, 1996. This Court has jurisdiction to review this decision under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Amendment I, the Religious Freedom Restoration Act, 42 U.S.C. §2000bb and various provisions of the California Fair Employment and Housing Act (California Government Code §§ 12948, 12955 (a) & (d) and 12995) and the Unruh Act (California Civil Code §51) are all found at App. 218a-220a.

STATEMENT OF THE CASE

Evelyn Smith is a 64-year-old widow who lives in Chico, California. Mrs. Smith earns her livelihood by managing and renting four one-bedroom town homes that she owns. App. 196a. Mrs. Smith does not live in these units. *Id.* Mrs. Smith began renting the town homes 1-3 years before the California Legislature prohibited marital status discrimination in housing in 1975. Hearing Transcript Vol. II, p. 70 and App. 13a.

A. Mrs. Smith's Religion-Based Reasons for Opposing Cohabitation.

Mrs. Smith is a Christian. App. 196a-197a. She has been a member of Bidwell Presbyterian Church in Chico since 1962. *Id.* Mrs. Smith believes that sex outside of marriage is sinful, and that it is a sin for her to rent her town homes to people who would engage in fornication on her property. App. 197a. Mrs. Smith "would not rent to anyone who engages in sex outside of marriage, whether they are single, divorced, widowed or

married." *Id.* Mrs. Smith believes that if she rents her units to people who will engage in sex outside of marriage there, God will punish her eternally and she would never see her deceased husband again in heaven. *Id.*

Mrs. Smith has received so many inquiries from unmarried couples that when someone calls about renting a unit, Mrs. Smith tells them that she prefers married couples, because of her religious beliefs against fornication. App. 196a.

Mrs. Smith has rented her units to people who are single, divorced, widowed and married. App. 197a. Mrs. Smith rents her town homes to people without regard to their race, color, national origin, ancestry or physical disability. *Id.* She has rented to men and women. She has rented to people of various religious faiths. She never inquires about a potential tenant's religious faith. *Id.*

B. Phillips-Randall Application and Cohabitation.

In late March and early April 1987, Mrs. Smith advertised in the local newspaper that she had a vacancy in one of her four units. Kenneth Phillips and Gail Randall, an unmarried couple who were living together, saw the advertisement and contacted Mrs. Smith about renting the place. *Id.* At the time of the incident, Randall was a full-time student at California State University, Chico. App. 199a. Phillips ran a landscaping business, together with Randall. *Id.* Gail Randall and Kenneth Phillips had been living together for more than five years at the date of the hearing in April 1988. App. 181a. They had never been married. App. 198a.

Mrs. Smith gave them a tour of the unit on April 2, 1987. At that time, Phillips falsely told Mrs. Smith that they were married. App. 198a. Later, Phillips and Randall called Mrs.

Smith again and told her they were interested in renting the unit. They met on April 7, 1987, gave her a deposit of $150 and signed a lease. App. 198a. On the rental agreement, Gail Randall signed her name as, "Gail Phillips," although that was not her name and has never been her name. *Id.* Around the same time, Gail Randall also joined the Kangaroo Kourts athletic club by using the name, "Gail Phillips," because the membership fee was less expensive for married couples. Transcript of Hearing, Vol. II, pp. 37-38.

Later that day, Gail Randall called Mrs. Smith and asked if she doubted that Randall and Phillips were married. *Id.* Mrs. Smith said she believed what they had told her. Randall persisted, and repeatedly asked Mrs. Smith if she wanted to see their marriage license. Mrs. Smith said, "no." App. 198a.

Still later on April 7, Kenneth Phillips called Mrs. Smith, and told her for the first time that he and Gail Randall were not married. When confronted with this revelation, Mrs. Smith said that she could not rent to an unmarried cohabiting couple, because that would violate her religious beliefs. *Id.* Mrs. Smith then sent them a check refunding their $150 deposit. *Id.*

C. The Administrative Hearing and Decision.

Phillips and Randall filed complaints with the California Department of Fair Employment and Housing accusing Mrs. Smith of unlawful marital status discrimination, under the California Fair Employment and Housing Act, Government Code §§ 12900 *et seq.* and the Unruh Civil Rights Act, Civil Code §§ 51 *et seq.*

The Fair Housing Commission conducted a two-day administrative hearing on April 25 and 26, 1988, in Chico, California. The Commission heard evidence at that hearing.

At the administrative hearing, Mrs. Smith argued that the Free Exercise Clause of the First Amendment exempted her from punishment under the state fair housing laws for marital status discrimination. Mrs. Smith also argued that the compelled sign-posting requirement violated her rights under the Freedom of Speech Clause. App. 208a-9a, 212a.

On August 17, 1989, the Commission issued its decision against Mrs. Smith. That decision is not reported. It appears at 194a. The Commission found that Mrs. Smith's actions violated the Fair Employment and Housing Act's and the Unruh Act's prohibitions on marital status discrimination. Although Mrs. Smith raised the Free Exercise Clause and the Freedom of Speech Clause as defenses (208a-9a, 212a), the Commission declined to rule on her constitutional claims, saying that the state constitution bars administrative agencies from doing so (*Id.*). The Commission ordered Mrs. Smith:

1. To cease and desist from marital status discrimination against unmarried couples in housing.

2. To pay the complainants $954 in damages; [This amount was later reduced to $454 after a decision by the California Supreme Court stating that the Commission could not award damages for emotional distress. See App. 8a, n.5.]

3. To sign and post copies of a notice detailing the litigation (and the fact that Mrs. Smith had lost) in her rental units for 90 days after the effective date of the decision;

4. To sign and post permanently in her rental units a poster describing tenants' rights under the Fair Employment and Housing Act. The two signs were attached to the Commission's opinion (the first sign - App. 215a; the second sign - App. 216a-217a). The first sign read as follows (App. 215a):

NOTICE
to
APPLICANTS FOR RENTAL HOUSING
offered by
EVELYN SMITH

After a full hearing, the California Fair Employment and Housing Commission has found that Evelyn Smith, the owner of rental property at 675-685 Eastwood Avenue, Chico, California, violated the California Fair Employment and Housing Act by refusing to rent to two applicants because they were an unmarried couple. (DFEH v. Evelyn Smith (1989) FEHC Dec. No. 89-11).

As a result of this finding, the Commission has ordered posting and distribution of this Notice and:

1) Payment to those applicants of money damages for their out-of-pocket losses and for their emotional injury; and

2) Posting and distribution of official notices and posters concerning rental applicants' rights and remedies under the California Fair Employment and Housing Act.

Dated : _____ By: _____
Evelyn Smith

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL REMAIN POSTED FOR 90 DAYS IN THIS LOCATION AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.

D. California Court of Appeal Decision.

Mrs. Smith appealed to the California Court of Appeal. Although the parties submitted all of their briefs by January 1990, the Court of Appeal did not schedule oral arguments until January 1994.

During that four-year period, two major changes occurred in religious liberty law. First, this Court issued its opinion in *Employment Division v. Smith,* 494 U.S. 872 (1990), which significantly changed the test for cases arising under the Free Exercise Clause. Before *Smith*, this Court used the compelling state interest test for free exercise cases outlined in *Sherbert v. Verner*, 374 U.S. 398 (1963). The compelling state interest test states that if government action burdens the sincere religious exercise of a person, the government would have to justify that burden by showing it served a compelling state interest, implemented by the least restrictive means. In *Employment Division v. Smith*, this Court said that the compelling state interest test could not be used to challenge general laws that were formally neutral toward religion. The compelling state interest test would apply only to laws targeting religion, or cases involving "hybrid rights," that is, a free exercise claim combined with another constitutional claim, such as freedom of speech or association.

The second major change in religious liberty law was the enactment of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §2000bb *et seq.* in November 1993. RFRA created a statutory right to use the compelling state interest test to decide free exercise cases, as this Court had done to decide free exercise cases before *Employment Division v. Smith.* RFRA became law about two months before the California Court of

Appeal heard oral arguments in this case.

At the oral arguments in January 1994, the parties argued their positions on RFRA and the "hybrid rights" claims under *Employment Division v. Smith.* The Court of Appeal requested post-hearing briefs discussing RFRA and the "hybrid rights" issue.

Mrs. Smith argued in her post-hearing brief that the case should be decided under the RFRA, because it applied retroactively to all cases pending in court at the time of its enactment in November 1993. See RFRA 42 U.S.C. at §2000bb-3(a). Mrs. Smith also argued that the Commission had violated her "hybrid rights" -- free exercise plus freedom of speech, because the Commission was compelling her to post the signs against her will in violation of her religious beliefs.

On May 26, 1994, The California Court of Appeal reversed the ruling of the Commission, and found that the Commission's order violated Mrs. Smith's rights under the federal and state constitutions' Free Exercise Clauses. The Court of Appeal ruled that Mrs. Smith stated a hybrid claim under *Employment Division v. Smith* -- freedom of speech plus free exercise of religion. The Court of Appeal held that this case presented a hybrid rights claim because the Commission's requirement that Mrs. Smith sign and post notices in her rental units violated her free speech rights under the First Amendment. App. 166a-172a.

The Court of Appeal ruled that the Commission had substantially burdened Mrs. Smith's free exercise rights by prosecuting and punishing her for her actions in this case. The Court of Appeal further ruled that the state lacked a compelling state interest to justify its burden on Mrs. Smith's rights. That court pointed out that the Fair Employment and Housing Act,

under which Mrs. Smith was convicted, specifically empowered all public and private colleges and universities to prohibit unmarried couples from living together in campus housing, by allowing the schools to set up married student housing and single sex dorms. California Government Code § 12995 (2).

The Court of Appeal pointed out that all of the state universities had the authority to refuse to rent living space to unmarried cohabiting couples, which was the very thing the state was punishing Mrs. Smith for doing. App. 177a, n.12. At the time this case occurred, Gail Randall was a student at Chico State University. App. 199a. The state university would not allow her to cohabit with a man in the state's student housing.

Further, the Court of Appeal said the state lacked a compelling state interest because the Legislature and the state courts had refused to extend the legal rights and privileges that married couples have to unmarried couples.

The Court of Appeal found it unnecessary to address the RFRA claim because it uses the same compelling state interest test the Court of Appeal used to decide the federal Free Exercise Clause hybrid right claim. App. 155a. The Commission, Phillips and Randall (the unmarried couple) appealed to the California Supreme Court.

E. California Supreme Court Decision.

The California Supreme Court granted review in this case and reversed the Court of Appeal by a 4-3 vote on April 9, 1996. Although there was no majority opinion, a majority of that court held that:

1) Mrs. Smith suffered no "substantial burden" sufficient to

trigger protection under the Free Exercise Clause; and

2) The Religious Freedom Restoration Act offers no protection for Mrs. Smith because she suffered no substantial burden under RFRA (Justice Werdegar's opinion) or because RFRA is unconstitutional (Justice Mosk's opinion).

The plurality opinion, written by Justice Werdegar, ruled that the state had not substantially burdened Mrs. Smith's rights under the federal Free Exercise Clause or RFRA because she could "avoid the conflict, without threatening her livelihood, by selling her units and redeploying the capital in other investments." App. 32a. Therefore, "she can avoid the burden on her religious exercise without violating her beliefs or threatening her livelihood." App. 40a.

Additionally, the plurality opinion said there was no substantial burden on Mrs. Smith's religious liberty because "the landlord's request for an accommodation in the case before us has a serious impact on the rights and interests of third parties." App.32a-33a.

In a concurring opinion, the fourth justice of the majority against Mrs. Smith, Justice Mosk, stated that he "generally concur[ed] in the opinion prepared by Justice Werdegar"(App. 47a). He added that RFRA is unconstitutional because Congress violated the separation of powers by passing it. *Id.*

Chief Justice Lucas and Justices Kennard and Baxter dissented. Justice Kennard wrote the first dissenting opinion saying that the state had substantially burdened Mrs. Smith's rights under the Free Exercise Clause and RFRA, and that the state lacked a compelling interest to justify that burden. App. 65a-103a.

Justice Baxter, joined by Chief Justice Lucas, agreed that the state had substantially burdened Mrs. Smith's rights under RFRA. Justice Baxter wanted to remand the case to see if the state could prove a compelling state interest under RFRA. App. 104a-154a. Justice Kennard correctly said that there was no need to remand, because the case had been tried under the old *Sherbert-Yoder* test, which contained the compelling state interest requirement now present in RFRA. App. 99a, n.8.

REASONS FOR GRANTING THE PETITION

I.

THIS COURT SHOULD GRANT REVIEW BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S DEFINITION OF "SUBSTANTIAL BURDEN"

A. The California Supreme Court's Decision Makes Protection Under RFRA and the Free Exercise Clause Inaccessible to Most People, By Making the "Substantial Burden" Requirement Too Difficult to Meet.

With its 4-3 decision, the California Supreme Court has pushed out of reach for most people the protections of the Religious Freedom Restoration Act and the Free Exercise Clause. Few people could ever meet that court's extreme definition of "substantial burden." The California Supreme Court ruled that the state's actions forcing Mrs. Smith to violate her religious beliefs or permanently abandon her rental business did not substantially burden her free exercise of religion under RFRA or the Free Exercise Clause because Mrs. Smith could sell her town houses and give up her chosen occupation. That court reasoned that no matter how coercive

the government's actions against Mrs. Smith have been, the government escapes all judicial scrutiny under RFRA or the Free Exercise Clause because Mrs. Smith could "avoid the conflict, without threatening her livelihood, by selling her units and redeploying the capital in other investments." App. 32a. In other words, if Mrs. Smith would sell her property and stop earning her living as a landlord, the conflict would end and any burden on her religious exercise disappears.

The California Supreme Court's shallow analysis is clearly wrong because Mrs. Smith can do nothing at the present time to eliminate the punishments the state has levied against her. She is burdened *now* by the Commission's ruling.

The California Supreme Court also ignores the crushing impact of its decision on Mrs. Smith. Mrs. Smith earns her living by "actively managing her rental property," (Kennard, J. dissenting, App. 81a). Selling her units would massively disrupt her life. She would have to pay capital gains taxes on these units she bought in the early 1970's, give up an occupation she enjoys, and find another way to support herself.

In addition to those significant economic burdens, Mrs. Smith must also endure punishment for violating the state fair housing laws. As Justice Kennard described it in her dissent:

> For following her religious beliefs rather than [the California Fair Employment and Housing Act] Smith is subject to civil penalties, a cease-and-desist order dictating her future conduct, and imprisonment. (App.80a).

The California Supreme Court ignored these burdens on Mrs. Smith and instead, created an unprecedented definition of substantial burden: If the religious adherent can do something

to remove herself from the legal conflict, there is no burden on her religious exercise, no matter how onerous the government's actions are in the particular case. Because Mrs. Smith could sell her properties and get out of the landlord business, there is no burden on her rights under RFRA or the Free Exercise Clause.

In other contexts, California law provides that loss of these units is presumptively irreparable injury, not adequately remedied by monetary compensation. *See, e.g.,* California Civil Code §3387 (presumptively authorizing specific performance of contracts for sale of land); *Jessen v. Keystone Savings & Loan Association,* 142 Cal.App.3d 454, 191 Cal.Rptr. 104, 107 (4th Dist. 1983) (ruling that damages would not be an adequate remedy for loss of two rental units). It is absurd to hold by contrast that forced sale of these units is no substantial burden on Mrs. Smith's rights to religious liberty.

In similar landlord cases, Justice Clarence Thomas and three state supreme courts found these penalties to be a substantial burden under the compelling state interest test used in RFRA. In his dissent from denial of certiorari in *Swanner v. Anchorage Equal Rights Commission*, 115 S.Ct. 460, 130 L.Ed.2d 368 (1994), Justice Thomas said the government "substantially burdened" the RFRA rights of the landlord with religious convictions against renting to unmarried couples when the government prosecuted him for housing discrimination:

> I would grant certiorari to resolve whether, under RFRA, an interest in preventing discrimination based on marital status is sufficiently "compelling" that respondent may *substantially burden* petitioner's exercise of religion.

Swanner, 130 L.Ed.2d at 368 (emphasis added).

The state supreme courts of Massachusetts, Alaska and Minnesota also found that prosecuting landlords for marital status discrimination for refusing to rent to unmarried couples substantially burdened their exercise of religion. *See Attorney General v. Desilets*, 418 Mass. 316, 636 N.E.2d 233 (1994); *Swanner v. Anchorage Equal Rights Commission*, 874 P.2d 274, 281 (Alaska 1994) and *State by Cooper v. French*, 460 N.W.2d 2 (Minn. 1990). These cases are discussed more fully in Section II-A. All three state supreme courts found that the government had substantially burdened the religious freedom of the landlords, even though the landlords did not prevail in all three of those cases.

The California Supreme Court justifies its novel approach to determining "substantial burden" by stating that Mrs. Smith "does not claim that her religious beliefs require her to rent apartments; the religious injunction is simply that she not rent to unmarried couples." App. 34a.

Whether Mrs. Smith believes "God called her to be a landlord" is irrelevant to this case. The California Supreme Court erred by not analyzing this case at the point where Mrs. Smith's religious beliefs conflict with the legal requirement. Here, California law says landlords must rent to unmarried cohabiting couples. Mrs. Smith said that she could not, due to her religious beliefs. This is not a conflict about Mrs. Smith *demanding to be a landlord* when state law says she may not.

Also, there is no requirement that Mrs. Smith must have a religious belief to do something she already has the constitutional right to do -- to choose a common occupation, such as being a landlord. Her liberty interests under the Fourteenth Amendment protect "the right of the individual ... to engage in any of the common occupations of life." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). California has no plenary

power to order people in or out of specific occupations. Whether Mrs. Smith feels "called by God" to be a landlord has no bearing on the RFRA and Free Exercise Clause analyses in this case, because it is not the point where state law and her religious convictions collide.

The California Supreme Court's reasoning grossly conflicts with decisions of this Court. For example, under the reasoning of the California Supreme Court, this Court should have ruled against the workers in the cases of religious adherents seeking unemployment compensation for losing their jobs, by ruling that the workers could have all found other jobs. None of these employees had religious beliefs that they had to work at their specific jobs. *See Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Thomas v. Review Board*, 450 U.S. 707, 713-14 (1981); *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987); and *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989).

Additionally, this Court should have ruled against the Amish in *Wisconsin v. Yoder*, 406 U.S. 205 (1972) or the members of the Santeria faith in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) by telling them to move out of Wisconsin and the City of Hialeah respectively, and simply go somewhere else. The Amish had no religious belief that they had to live in Wisconsin, nor the Santeria church a belief that it had to locate in Hialeah.

In other contexts, this reasoning would be unthinkable. A court would never dismiss a complaint by a woman alleging sexual harassment at her workplace on the grounds that she could resolve the conflict by "quitting and finding another job."

At the very least, the ruling below means that all regulations that apply to particular occupations or types of property are

totally immune from scrutiny under RFRA or the Free Exercise Clause. Anyone challenging a legal requirement on religious liberty grounds could always resolve the burden by changing occupations, or by selling their property. As Justice Kennard noted in dissent, a law requiring obstetricians to perform abortions would impose no substantial burden on anyone's religion, because people aren't usually compelled by their religious beliefs to be obstetricians. App. 91a. The California Legislature understands that people in the health professions may have religious objections to participating in abortion procedures, so state law exempts medical personnel from doing them. California Health & Safety Code §25955(a).

This Court has *rejected* the view that the government may infringe on someone's First Amendment freedom of expression if the person can exercise it somewhere else. "One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Grayned v. City of Rockford*, 408 U.S. 104, 119 n. 40 (1972), quoting *Schneider v. State*, 308 U.S. 147, 163 (1939). Likewise, no one should be denied their religious liberties on the grounds that they exercise them elsewhere.

This Court has been very clear that the government substantially burdens someone's religious beliefs if the government forces the person to choose between earning their livelihood and obeying the dictates of their faith. This Court defined "burden" under the Free Exercise Clause to be:

> forcing her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.

Sherbert v. Verner, 374 U.S. 398, 404 (1963), quoted in *Hobbie v. Unemployment Appeals Commission,* 480 U.S. 136, 140 (1987). Similarly,

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.

Thomas, 450 U.S. at 717-18.

The burden on Mrs. Smith's religious beliefs is much greater than mere denial of state benefits. The Commission's decision forced Mrs. Smith to choose among three harsh choices, each of which substantially burdened her rights:

> - violate her religious beliefs by renting to an unmarried cohabiting couple; or
>
> - refuse to rent to the unmarried couple and suffer punishment inflicted by the state;
>
> - stop renting her town houses, give up her livelihood, leave her chosen occupation and surrender her property rights to earn income.

Any of these options substantially burden Mrs. Smith's religious exercise and places "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas,* 450 U.S. at 718. The state-imposed dilemma on Mrs. Smith "puts the same kind of burden upon the free

exercise of religion as would a fine against her for ... [religious] worship." *Sherbert v. Verner,* 374 U.S. 398, 404 (1963) (emphasis added).

This is not a case in which the government's rules merely make Mrs. Smith's exercise of religion more expensive, as they did to the Orthodox Jews in *Braunfeld v. Brown,* 366 U.S. 599 (1961) and Jimmy Swaggart in *Jimmy Swaggart Ministries v. California Bd. of Equalization* , 493 U.S. 378 (1990). Those cases do not apply here, as Justice Kennard stated in dissent, because "none of them involved a government rule requiring an individual to act contrary to his or her religious beliefs in order to conduct the activity in question, and none of them presented a conflict between religious belief and secular command that could only be resolved by abandoning the activity in question." App. 87a. In other words, the Orthodox Jews in *Braunfeld* were free to close their stores on Saturdays, although the secular law also required them to close on Sundays. Jimmy Swaggart was free to sell Bibles at his crusades in California; he simply had to pay state sales tax, too. Mrs. Smith cannot act on her beliefs (refuse to rent to cohabiting couples). The legal requirement directly prohibits her religious exercise. The state's burden on Mrs. Smith's religious exercise is substantial.

B. This Court Has Ruled That Governmental Prosecution and Punishment Are Obvious Examples of a Substantial Burden on One's Free Exercise Rights.

The California Supreme Court failed to understand that this Court has ruled that government *prosecution* and *punishment* are obvious examples of a substantial burden on a person's religious exercise. If withholding of governmental benefits constitutes a burden of one's rights under the First Amendment

and RFRA, how much more do governmental prosecution, conviction and imposition of penalties constitute a burden.

This Court has repeatedly found that when the government prosecutes someone for exercising a First Amendment right, the government has burdened that person's constitutional rights. For example, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Amish parents who would not send their children to public schools beyond the 8th grade were "charged, tried, and convicted of violating the compulsory-attendance law in Green Country Court." 406 U.S. at 208. This Court found those actions to burden their free exercise rights because: "Wisconsin law affirmatively compels them, *under threat of criminal sanction*, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." 406 U.S. at 218 (emphasis added). Congress specifically referred to *Wisconsin v. Yoder* as a case to interpret RFRA when it said that the purpose of RFRA is "to restore the compelling state interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." *See RFRA*, 42 U.S.C. §2000bb(b). Congress intended for a *Yoder*-like prosecution to constitute a substantial burden under RFRA.

The California Supreme Court ignores this obvious point with its discussion of Mrs. Smith's ability to sell her town homes and to permanently abandon her occupation. Therefore, this Court should grant review of this case and reaffirm that government prosecution and punishment of someone to the magnitude that Mrs. Smith has been prosecuted and punished is a substantial burden on their rights under RFRA and the Free Exercise Clause, if they have acted based on their religious convictions.

II.

THIS COURT SHOULD GRANT REVIEW BECAUSE THE CALIFORNIA SUPREME COURT'S DECISION GREATLY ADDS TO THE CONFUSION IN THE LOWER COURTS OVER WHAT IS A BURDEN UNDER THE FREE EXERCISE CLAUSE AND RFRA

A. This Decision Conflicts with Decisions by the Massachusetts, Alaska and Minnesota Supreme Courts.

This Court should grant review of this case to resolve the conflict with decisions in similar landlord cases decided by the supreme courts of Massachusetts, Alaska and Minnesota. These three courts agreed that the state had burdened the landlords' religious liberties by prosecuting them for marital status discrimination, and all of those courts said that the religious liberty issue must be resolved by determining whether there is a compelling state interest. No other state appellate court has decided a landlord case by ruling that the landlords' constitutional rights were not burdened by a governmental prosecution.

Although these state supreme courts interpreted their state constitutions' free exercise clauses in these landlord cases, they all used the compelling state interest test used in RFRA. Justice Clarence Thomas stated that "[t]here is no doubt that these decisions applied the *Sherbert-Yoder* test adopted by RFRA." *Swanner v. Anchorage Equal Rights Commission*, 130 L.Ed.2d 368, 370, n.2 (1994) (dissent from denial of cert.).

In *Attorney General v. Desilets*, 418 Mass. 316, 636 N.E.2d 233 (1994), two brothers who were devout Roman Catholics refused to rent one of their four apartments to an unmarried

couple because of their religious beliefs against facilitating sex outside of marriage on their property. The Attorney General of Massachusetts prosecuted the Desilets brothers for violating the state law prohibiting marital status discrimination in housing.

The Massachusetts Supreme Judicial Court had no problem finding that the state's prosecution of the landlords created a substantial burden on their religious liberties:

> Here ..., the government has placed a burden on the defendants that makes their exercise of religion more difficult and more costly. The statute affirmatively obliges the defendants to enter into a contract contrary to their religious beliefs and provides significant sanctions for its violation.

Desilets, 418 Mass. at 324. The Massachusetts high court understood the common sense reasoning that the coercion inherent in a governmental prosecution and punishment of someone for exercising their religious liberties is a classic example of a substantial burden on their free exercise rights. The Massachusetts Supreme Judicial Court remanded the case to the trial court to see if the state could prove that cohabiting couples have suffered systematic discrimination in Massachusetts or in the particular community where the events occurred. The state then settled the case out of court with the landlords, and dismissed all charges against the Desilets.

In the second case, the Alaska Supreme Court assumed that the prosecution of a Christian landlord for marital status discrimination when he refused to rent to unmarried couples substantially burdened the landlord's free exercise rights. *Swanner v. Anchorage Equal Rights Commission,* 874 P.2d 274, 281 (Alaska 1994). The Alaska Supreme Court ruled

that the state had a compelling interest to protect the "private right of unmarried couples to not be unfairly discriminated against in housing." *Id.* at 284. That court specifically found this interest to be a compelling state interest under RFRA. *Id.*, at 280, n.9. That court would not have reached the compelling state interest question unless there was a substantial burden on the landlord's RFRA rights. Although the majority of the Alaska Supreme Court ruled against the landlord, every justice on that court found that the government had substantially burdened the landlord's rights under the compelling state interest test by prosecuting him.[1]

In the third case, six of the seven justices on the Minnesota Supreme Court, applying the compelling state interest test, agreed that the state's prosecution of an evangelical Christian landlord for refusing to rent to an unmarried couple burdened his free exercise rights. In *State by Cooper v. French,* 460 N.W.2d 2 (Minn. 1990), the Minnesota Supreme Court ruled 4-3 in favor of the Christian landlord on the grounds that the state statutory prohibition on "marital status" discrimination did not apply to unmarried couples. Six of the seven justices addressed the landlord's free exercise defense, and they deadlocked 3-3.

All six Minnesota Supreme Court justices agreed that the state prosecution of the landlord burdened his free exercise of

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[1] This Court's denial of certiorari in *Swanner* in no way suggests that this case is not deserving of review. The RFRA claim in *Swanner* was presented only on a petition for rehearing to the state supreme court, and that court disposed of the RFRA issue summarily in a footnote. *See Swanner*, 874 P.2d at 280, n.9. In addition, the Alaska Supreme Court's decision does not have the widespread impact of the California Supreme Court's decision, which makes RFRA inaccessible to most people in California by setting the burden requirement so unattainably high.

religion, but they divided evenly on whether the government had a compelling state interest to justify the burden on the landlord's rights. For all six justices, there was no dispute that the state's prosecution met the burden requirement under the compelling state interest test. *Id.*, at 10 and 14-15.

This Court should review the California Supreme Court's decision, because it improperly resolved the case by holding that prosecuting the landlord and driving her out of business was not a substantial burden. Three other state supreme courts have addressed that issue, and the California Supreme Court's decision conflicts with all three of them. This case should be resolved on the issue of whether there is a compelling state interest, not on the question of substantial burden issue as the California Supreme Court did.

B. Federal Appeals Courts Use Multiple and Conflicting Tests To Determine What is a Substantial Burden Under RFRA.

Federal courts have suggested a variety of conflicting ways to define "substantial burden" under RFRA. At least eight federal appeals courts have defined four different standards, as Chief Judge William Posner described in a decision that came down six days before the California Supreme Court's decision in this case, *Mack v. O'Leary*, 80 F.3d 1175 (7th Cir. 1996). Chief Judge Richard Posner wrote for a unanimous panel. He described this confusion among the circuit courts over the definition of "substantial burden" under RFRA, and then added a new definition as the RFRA standard for the Seventh Circuit.

In summary, Chief Judge Posner identified two factors that divide the various circuits when it comes to defining "substantial burden" under RFRA. The first is whether RFRA protects religiously-*motivated* conduct as well as conduct

compelled by one's religion. The second dispute among the circuit courts is whether RFRA requires the religious beliefs at issue to be "central" to the person's religion. The circuits have ruled various ways on both issues. *See Mack*, 80 F.3d at 1178.

The Fifth Circuit surveyed many of these same standards on substantial burden and concluded that RFRA's "statutory contours are vague and its legal limits and standards have yet to be defined." *Hicks v. Garner*, 69 F.2d 22, 26 (5th Cir. 1995).

This Court need not decide a comprehensive definition of "substantial burden" under RFRA to resolve Mrs. Smith's case and to find that the judgment below is in error. The California Supreme Court's decision is far out of line with the debate among the courts elsewhere. Its extreme holding nullifies most applications of RFRA in the nation's largest state.

In Mrs. Smith's case, there is no dispute that her conduct is compelled by her religious faith and central to her beliefs. She believes that God will deny her eternal salvation if she knowingly rents to couples that will have sex outside of marriage in her rental housing. App. 197a. The California Supreme Court has held that even such central and compulsory religious conduct is unprotected if the believer can avoid the conflict with state law by selling her property and permanently changing her occupation. This extreme rule trivializes RFRA and the Free Exercise Clause, because few people, if any, could ever meet such a high standard to gain protection for their religious exercise. This decision requires review by this Court.

III.

THIS COURT SHOULD ACCEPT THIS CASE TO DETERMINE WHETHER CALIFORNIA HAS A "COMPELLING STATE INTEREST" TO JUSTIFY ITS SUBSTANTIAL BURDEN ON MRS. SMITH'S RIGHTS

This Court should grant review on the question of whether California has a compelling state interest to justify its substantial burden on Mrs. Smith's religious liberty rights in this case. Although the majority of the California Supreme Court justices sidestepped the compelling state interest question, this Court should decide that issue and not remand it to the lower court. The compelling state interest issue in this case has been thoroughly addressed by both sides at every level of the proceedings. The California Court of Appeal thoroughly examined the issue and found that the state lacked a compelling state interest in this case. App. 172a-178a. All parties fully briefed the compelling state interest issue at the California Supreme Court, but that court refused to rule on it.

The compelling state interest issue in this case is a question of law, so there is no reason to remand it back to the California Supreme Court. A remand on this point would not result in judicial economy but only in unnecessary delay in resolving this case which has been going on since early 1988.

For reasons clearly stated by the California Court of Appeal, California has no compelling interest here under this Court's precedents. California law does not plausibly assert a compelling interest in protecting the right of unmarried couples to live together in a sexual relationship.

To the contrary, the California Supreme Court said in

another case, "[w]e reaffirm our recognition of a strong public policy favoring marriage [citation omitted]. No similar public policy favors the maintenance of nonmarital relationships." *Norman v. Unemployment Insurance Appeals Board,* 34 Cal.3d 1, 9, 192 Cal.Rptr. 134, 663 P.2d 904 (1983). California law routinely refuses to grant unmarried couples the same rights and privileges as it grants married couples in areas of law dealing with torts, insurance, evidence, property, family law and inheritance. *See* App. 139a-140a.

This policy against unmarried cohabitation extends to housing the state controls. The very statute at issue in this case expressly authorizes all public and private colleges and universities to exclude unmarried couples from campus housing, by allowing them to maintain housing for married couples only, and single-sex housing. California Government Code §12995 (2). Also, the California Supreme Court has upheld a state prison policy allowing conjugal visits for married couples, but not for unmarried couples. *In re Cummings,* 30 Cal.3d 870, 180 Cal.Rptr. 826, 640 P.2d 1101 (1982)

"This law has every appearance of a prohibition that society is prepared to impose upon [landlords] but not upon itself. Such a prohibition does not protect an interest 'of the highest order.'" *Florida Star v. B.J.F.*, 491 U.S. 524, 542 (1989) (Scalia, J., concurring). One thing that is settled in this Court's rulings on compelling state interests, it is that an interest that the state pursues in some contexts and not in others, leaving "appreciable damage to that supposedly vital interest unprohibited," is not a compelling state interest. *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 547 (1993), quoting *Florida Star*, 491 U.S. at 541-42 (Scalia, J., concurring). To similar effect, *see Simon v. Schuster, Inc., v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 119-120 (1991); *Minneapolis Star & Tribune Co. v. Minnesota*

Commissioner of Revenue, 460 U.S. 575, 585-90 (1983); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 104-05 (1979).

The California Supreme Court in effect did address the compelling state interest question by ruling that Mrs. Smith could not prevail because her religious exemption would affect the rights of third parties. App. 32a-33a. Although the California Supreme Court addressed this issue in the context of the substantial burden issue, *(id.)*, the effect on third parties is actually a question of the state's compelling interest. As Justice Kennard wrote, the issue of whether protecting Mrs. Smith's rights might have an impact on third parties has nothing to do with whether Mrs. Smith has been burdened by the state's actions, but is a factor weighed when determining whether a compelling state interest exists. App. 83a-84a.

The state supreme courts of Massachusetts, Alaska and Minnesota have addressed the compelling state interest issue in these landlord cases. The Massachusetts Supreme Judicial Court defined the state interest narrowly as "eliminating housing discrimination against cohabiting couples," *Desilets*, 418 Mass. at 330. The Alaska Supreme Court opted for a more general compelling state interest of "combating discrimination," *Swanner*, 874 P.2d at 280, n.9. The Minnesota Supreme Court evenly divided on this point, with three justices saying the state interest was "promoting access to housing for cohabiting couples," *French*, 460 N.W.2d at 10 and three other justices saying there was a compelling state interest in "eradicating invidious discrimination." *Id.* at 16.

This Court has said that "only those interests of the highest order .. can overbalance legitimate claims to free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. at 215. Justice Clarence Thomas referred to that standard in *Swanner, supra,* and stated that he was "skeptical that Alaska's purported

interest in preventing discrimination on the basis of marital status is 'compelling' enough to satisfy these stringent standards." *Swanner*, 130 L.Ed.2d at 369.

This Court should grant review on the question of whether the State of California has a compelling state interest in protecting the ability of unmarried couples to find housing for their sexual relations.

IV.

MRS. SMITH STATES CLAIMS UNDER THE FREE EXERCISE CLAUSE

Mrs. Smith's claims under the Free Exercise Clause should be examined under the compelling state interest test. *Employment Division v. Smith*, 494 U.S. 872, 878-880 stated that neutral laws of general applicability cannot be challenged under the Free Exercise Clause. However, the fair housing statute at issue in this case is not a law of general applicability. That law allows all state-run and private colleges and universities to exclude unmarried couples in the same way Mrs. Smith does. *See* App. 176a-177a. Because the fair housing statute is not one of general applicability, the state must defend its law under the compelling state interest test.

Mrs. Smith also raises "hybrid" claims under *Employment Division v. Smith,* 494 U.S. 872, 881 (1990), which triggers review under the compelling state interest test. The California Court of Appeal found that Mrs. Smith stated a claim of free exercise plus freedom of speech, because the state is coercing her to post signs she would not post on her own. The Court of Appeal relied on *Wooley v. Maynard*, 430 U.S. 705 (1977) and other decisions of this Court for that ruling. App. 165a-171a.

Mrs. Smith also states a hybrid claim of free exercise plus property rights under the Takings Clause and the Fourteenth Amendment. The California Supreme Court has put this hybrid right clearly at issue with its ruling that Mrs. Smith must either violate her religious beliefs or sell her rental property.

There are at least two ways governmental action can effect a taking of property -- a physical intrusion, *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015 (1992) or action that deprives the owner of economically viable use of the land. *Id.* at 1016. Here the state does both. First, the state commands a physical intrusion. The fair housing commission ordered Mrs. Smith to "cease and desist" her marital status discrimination, thereby forcing Mrs. Smith to allow people to occupy her town homes that she would not absent government coercion. This compelled physical intrusion violates her right to exclude others from her property. *See Dolan v. City of Tigard,* 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).

Second, there is a regulatory taking under *Lucas*. The California Supreme Court's solution is for Mrs. Smith to sell her rental units. By doing so, Mrs. Smith can no longer earn income by renting them. Therefore, the California Supreme Court's ruling "denies [Mrs. Smith] economically viable use of [her] land." *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015 (1992). The California Supreme Court forces Mrs. Smith to choose between fidelity to her religious beliefs or exercising her rights as an owner to earn income from her property. Therefore, this case presents a hybrid claim of free exercise of religion plus property rights.

CONCLUSION

For these reasons, petitioner Evelyn Smith asks this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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